

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN MICHAEL MATTHEWS,
Plaintiff-Appellant,

v.

OREGON STATE BOARD OF HIGHER
EDUCATION, acting by and through

University of Oregon; DAVID

FROHNMAYER; JOHN MOSELEY;
LORRAINE DAVIS, in their official
and individual capacities,
Defendants-Appellees.

KEVIN MICHAEL MATTHEWS,
Plaintiff-Appellant,

v.

THE STATE OF OREGON, acting by

and through the University of

Oregon; JOHN T. MOSELEY;

LORRAINE DAVIS; JACK M. RICE;
ROBERT Z. MELNICK; MICHAEL D.
UTSEY; GEORGE Z. BROWN; RONALD
KELLET, in their official and
individual capacities,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, Chief District Judge, Presiding

No. 98-36218

D.C. No.

CV 98-06119-MRH

No. 99-35601

D.C. No.

CV-98-06215-TMC

OPINION

July 14, 2000--Portland, Oregon
Submission Withdrawn 98-36218 August 14, 2000
Submission Withdrawn 99-35601 July 18, 2000
Both cases resubmitted May 1, 2001

Filed May 9, 2001

Before: Alfred T. Goodwin, Susan P. Graber, and
William A. Fletcher, Circuit Judges.

Per Curiam Opinion

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COUNSEL

Donna Meredith Matthews, Eugene, Oregon, for the plaintiff-appellant.

Christina Chute, (98-36218), Richard Wasserman (99-35601),
Assistant Attorneys General, Salem, Oregon, for the
defendants-appellees.

OPINION

PER CURIAM:

Kevin Matthews appeals the District Court's summary judgment in favor of the University of Oregon in his action for damages and equitable relief. Matthews claims that the University violated state and federal law in denying him indefinite tenure upon the completion of his sixth year as an annual appointee to the faculty. After the correctness of the

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summary judgment had been briefed and argued in this court, we certified, pursuant to Or. Rev. Stat. §§ 28.2000-28.255 and Or. R. App. P. 12.20, a question of state law to the Oregon Supreme Court. See Matthews v. Oregon State Bd. of Higher Educ., 220 F.3d 1165 (9th Cir. 2000).

A companion appeal, Matthews v. Oregon, No. 99-35601, has been pending, with submission deferred, awaiting the outcome of this appeal. We now consolidate the two appeals and treat both as controlled by Oregon law as declared by the Supreme Court of that state.

On April 23, 2001, after briefing and argument before the Oregon Supreme Court, that Court filed its opinion on the certified question, and we now vacate the stay which held the appeal in No. 98-36218 in abeyance pending the decision of the state law questions by the highest court of the State of Oregon. See Matthews v. Oregon State Bd. of Higher Educ., No. SC S47802, 2001 WL 392693 (Or. Apr. 19, 2001). Pursuant to the opinion of the Oregon Supreme Court on the relevant questions of state law, and to our own judgment on questions of federal law, we affirm the summary judgment of the District Court in case No. 98-36218.

Because the substantive issues in Case No. 99-35601 are identical to the issues decided in case No. 98-36218, the claims in the former are precluded by the decision in the latter. The judgment in 99-35601 is therefore also affirmed as correct under Oregon law.

Because the two appeals are not categorically frivolous, and one of them at least raised justiciable questions of state law, we decline to award attorney fees to the State of Oregon or its officers and agencies as prevailing parties.

Both summary judgments are **AFFIRMED**.